Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,
Petitioners

Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause can "permit[] a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986).

PARTIES TO THE PROCEEDING AND RELIEF SOUGHT

A. Parties: Petitioners, the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, and the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court, seek a writ of prohibition or mandamus directed to the Honorable C. Clifton Young, Associate Justice of the Nevada Supreme Court, and the Honorable Robert Rose, Associate Justice of the Nevada Supreme Court. Sup. Ct. R. 14(b). Additional parties to these proceedings include Frankie Sue Del Papa, Nevada Attorney General; the Honorable David Zenoff, Senior Justice of the Nevada Supreme Court; Herbert J. Ahlswede, Special Master; the Nevada Commission on Judicial Discipline; and the Honorable Jerry Carr Whitehead, Nevada District Court Judge (Retired).

B. Relief Sought: Petitioners seek an order (1) vacating a July 12, 1996 Mandamus Order issued by two disqualified members of the Nevada Supreme Court and (2) directing the two disqualified justices of that court, Associate Justice C. Clifton Young and Associate Justice Robert Rose, to refrain from taking any further action that purports to modify the relief granted by the Nevada Supreme Court in a matter in which they are recused, including interfering with or blocking the appointment of any replacement judges necessary to finally dispose of the matter. Sup. Ct. R. 20(3).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RELIEF SOUGHT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING PETITION	14
I. THE CHALLENGED ORDER MODIFIES THE RELIEF GRANTED IN *WHITEHEAD*	16
II. DISQUALIFIED JUDGES MAY NOT AFFECT THE OUTCOME OF THE VERY CASE IN WHICH THEY ARE DISQUALIFIED TO ACT	19
III. THIS EXTRAORDINARY CASE DEMANDS RELIEF	24
CONCLUSION	27
APPENDIX A	1a
APPENDIX B	7a
APPENDIX C	9a
APPENDIX D	85a

TABLE OF CONTENTS—Continued

Page

APPENDIX E 92a

APPENDIX F 110a

APPENDIX G 133a

APPENDIX H 187a

APPENDIX I 277a

TABLE OF AUTHORITIES

Cases Page

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).. i, 1, 3, 16, 20, 23, 24
Allied Chem. v. Daiflon Inc., 449 U.S. 33 (1980) 14, 25
Application of Scott, 379 F.Supp. 622 (S.D. Tex. 1974) 21
Arnold v. Eastern Air Lines, 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)..... 21
Beckford v. District Court, 698 P.2d 1323 (Colo. 1985) (*en banc*) 21
Blaisdell v. Rochester, 609 A.2d 388 (N.H. 1992).... 22
Bolt v. Smith, 594 So.2d 864 (Fla. Dist. Ct. App. 1992) 22
Butler v. Biven Software, Inc., 473 S.E.2d 168 (Ga. Ct. App. 1996) 22
Byrd v. Brown, 613 S.W.2d 695 (Mo. Ct. App. 1981) 22
Chandler v. Judicial Council, 398 U.S. 74 (1970).... 24
Chilicote Land Co. v. Houston Citizens Bank and Trust, 525 S.W.2d 941 (Tex.App. 1975) 23
Degarmo v. State, 922 S.W.2d 256 (Tex. Ct. App. 1996) 23
Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1404 (1995) 20
El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136 (1st Cir. 1994) 20, 23
Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978)..... 21
Ferguson v. Pony Express Courier Corp., 889 S.W.2d 128 (Mo. Ct. App. 1995) 22
Gay v. United States, 411 U.S. 974 (1973) 19
Gubler v. Comm'n on Judicial Performance, 688 P.2d 551 (Cal. 1984) 21
Henderson v. State, 647 N.E.2d 7 (Ind. Ct. App. 1995) 22
In Re Cement Antitrust Litigation, 673 F.2d 1020 (9th Cir. 1982) 21
In Re School Asbestos Litigation, 977 F.2d 764 (3d Cir. 1992) 20, 25
In the matter of Risovi, 429 N.W.2d 404 (N.D. 1988) 22

TABLE OF AUTHORITIES—Continued

Page

In the matter of Rowe, 566 A.2d 1001 (Del. Ct. Judiciary 1989) 5
In re Aetna Casualty and Sur. Co., 919 F.2d 1136 (6th Cir. 1990) 23
In re Murchison, 349 U.S. 133 (1955) 19, 20
Johnson v. Sturdivant, 758 S.W.2d 415 (Ark. 1988) 21
Johnson v. Mehan, 731 S.W.2d 887 (Mo. Ct. App. 1987) 22
Johnson v. District Court, 674 P.2d 952 (Colo. 1984) 21
Judicial Qualifications Comm'n v. Schirado, 364 N.W.2d 50, n.1 (N.D. 1985) 7
Kerr v. United States District Court for the Northern District of California, 426 U.S. 394 (1976).. 15
Laird v. Tatum, 409 U.S. 824 (1972) 21
Longhini v. Bishop, 901 P.2d 962 (Or.App. 1995).. 22
Margulies v. Margulies, 528 So.2d 957 (Fla.App. 1988) 22
McCuin v. Texas Power and Light, 714 F.2d 1255 (5th Cir. 1983) 21, 25, 27
McElwee v. McElwee, 911 S.W.2d 182 (Tex. Ct. App. 1995) 23
Moody v. Simmons, 858 F.2d 137 (3d Cir.), *cert. denied*, 489 U.S. 1078 (1989) 20
New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976 (7th Cir. 1986) 20
People v. Langford, 616 N.E.2d 628 (Ill. App. Ct.), *appeal denied*, 624 N.E.2d 812 (1993) 22
Pueblo of Laguna v. Cillessen and Son, Inc., 682 P.2d 197 (N.M. 1984) 22
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 14, 25
Rogers v. State, 341 So.2d 196 (Fla. App.), *cert. denied*, 348 So.2d 953 (1977) 22
Rohrbach v. AT&T Nassau Metals Corp, 915 F. Supp. 712 (M.D. Pa. 1996) 21
Schlagenhauf v. Holder, 379 U.S. 104 (1964)..... 14, 25

TABLE OF AUTHORITIES—Continued

	Page
State v. Evans, 371 S.E.2d 432 (Ga. Ct. App. 1988)	22
State v. Nossaman, 666 P.2d 1351 (Or. App. 1983)	23
Stringer v. United States, 233 F.2d 947 (9th Cir. 1956)	21, 23
Thacker v. State, 563 N.E.2d 1307 (Ind. Ct. App. 1990)	22
Tumey v. Ohio, 273 U.S. 510 (1927)	19
United States v. Malmin, 272 F. 785 (3d Cir. 1921)	24
United States v. Widgery, 778 F.2d 325 (7th Cir. 1985)	21
United States v. Moody, 977 F.2d 1420 (11th Cir.), *cert. denied*, 507 U.S. 944 (1993)	20, 25
Vacura v. Harr's Equip., Inc., 364 N.W.2d 387 (Minn. 1985)	22
Constitutions	
Fla. Const. of 1968, art. V, § 12(d) (1994)	5
Ill. Const. art. VI, § 15(c)	6
Md. Const. art. 4 § 4B(a)	6
Mich. Const. of 1963, art. VI, § 30 (1996)	6
Miss. Const. § 177A	6
Mont. Const. art. VII, § 11	6
N.M. Const. art. VI, § 32	7
Neb. Const. art. V, § 30(5)	7
Nev. Const. art. VI, § 21(5)	4
Pa. Const. art. V, § 18(a)(8)	7
Tex. Const. of 1876, art. V, § 1-a(10) (1995)	7
U.S. Const. amend. XIV	2, 26
Statutes and Regulations	
28 U.S.C. §§ 1651(a), 1257	2
Adm. & Proc. Rules for the Nev. Comm. on Jud. Disc. 5(I)	4
Ark. Judicial Disc. and Disability Comm. Rules 7 (1996)	5
Colo. Rules of Jud. Disc., Rule 6 (1996)	5

TABLE OF AUTHORITIES—Continued

Page

Conn. Gen. Stat. § 51-511(a) (1993) 5
Ga. Rules of Jud. Qualifications Comm., Rule 20 (1996) 6
Haw. Sup. Ct. Rules, Rule 8 (1996) 6
Idaho Jud. Council Rules, Rule 24 (1996) 6
Iowa Code Ann. tit. XV ch. 602 R. 5 (West 1996) .. 6
La. Jud. Comm. Rule 10, La. Rev. Stat. Ann. § 8 (West 1996) 6
Mass. Gen. Laws Ann. 211C § 5 (West 1996) 6
Minn. Bd. Jud. Stds., Rule 6(b) (1996) 6
Mo. Sup. Ct. Rules, Rule 12.21 (1995) 6
N.C. Gen. Stat. § 7A-377(a) (1995) 7
N.J. Rules of Court, Rule 2:15-20 (1996) 7
N.Y. Jud. Law § 45 (McKinney 1996) 7
R.I. Sup. Ct. Rules art. VI, Rule 4.3 (1995) 7
S.C. App. Ct. Rules, Rule 502 (1996) 7
United States Supreme Court Rules
Rule 14(b) ii
Rule 20(1) 3, 14, 26
Rule 20(3) ..... ii, 4, 27
Va. Code Ann. § 2.1-37.13 (Michie 1996) 7
Vt. Rules for Disc. Control of Judges, Rule 6 (1995) 7
Wash. Comm. on Jud. Conduct Rules, Rule 292-08-050 (1995) 7
Wis. Stat. Ann. § 757.93 (West 1996) 8
Wyo. Jud. Supervisory Comm. Rules, Rule 7 (1995) 8

Miscellaneous

American Bar Association, Cannon 3(E)(1), *Model Code of Judicial Conduct* (1990) 20
American Bar Association, *Model Rules for Judicial Disciplinary Enforcement*
Rule 11(A)(1) 5
Rule (B)(1) 5
Rule 17(D)(1)(c) 5
Rule 17(D)(2)(c) 5

TABLE OF AUTHORITIES—Continued

Page

American Bar Association, *Standards Relating to Judicial Discipline and Disability Retirement* (1978)

§ 4.6 5

§ 2.8 8

Charles A. Wright, *Federal Practice and Procedure* § 3550 (1989) 23

Jeffery M. Shaman, *et al.*, *Judicial Conduct and Ethics* § 13.15 (1995) 5

IN THE

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IN RE THE HONORABLE THOMAS L. STEFFEN, CHIEF JUSTICE, NEVADA SUPREME COURT, and THE HONORABLE CHARLES E. SPRINGER, ASSOCIATE JUSTICE, NEVADA SUPREME COURT,

Petitioners

Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

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PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

Ten years ago, this Court declared that it was "aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986). In this extraordinary case, two members of the Nevada Supreme Court—after recusing themselves from considering the merits of a challenge to state judicial disciplinary procedures—have reentered the case and effectively "cast[] the deciding vote" (*id.*) by issuing a writ of mandamus against their own bench. Petitioners, the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, and the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court, respectfully request this Court to issue an extraordinary writ vacating the July 12, 1996

Mandamus Order of the two recused justices. In the alternative, Petitioners request that the Court grant a writ of certiorari to review the disputed order.

OPINIONS BELOW

The Mandamus Order signed by two recused justices of the Nevada Supreme Court (App. A 1a) is reported at 920 P.2d 489. That Order reaffirms an earlier unreported administrative order dated September 15, 1995 (App. B 7a) and an opinion dated April 25, 1996 (App. F 110a) reported at 915 P.2d 245. The decisions of the Nevada Supreme Court vacated in whole or in part by the Mandamus Order of the recused justices (App. C 9a; App. E 92a) are reported at 878 P.2d 913 and 908 P.2d 219. The Mandamus Order also vacates an opinion (App. G 133a) reported at 920 P.2d 491.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a) or, in the alternative, 28 U.S.C. § 1257. The Mandamus Order that is the subject of this Petition was issued July 12, 1996.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const., amend. XIV.

STATEMENT

This unusual case, involving a startling disregard of fundamental judicial procedure, presents "exceptional circumstances" that "warrant the exercise of the Court's

discretionary powers." Sup. Ct. R. 20(1). As the challenged Mandamus Order notes, this "matter has made a lasting, albeit hardly noble, imprint upon Nevada's judicial history." App. A 1a. By ignoring the most elemental requirements of due process to decide a case they are disqualified to adjudicate, the Respondent members of the Nevada Supreme Court have heaped ignominy upon the State's judicial system. The nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause cannot permit such a "decision to stand." *Aetna Life Ins. Co., supra*, 475 U.S. at 828.

This matter arose when Nevada District Court Judge Jerry Carr Whitehead filed a petition for a writ of prohibition with the Nevada Supreme Court against the Nevada Commission on Judicial Discipline (hereafter, "*Whitehead*"). In *Whitehead*, the Nevada Supreme Court entered final judgments interpreting the Commission's procedural rules and granting various forms of relief to Judge Whitehead. Although two members of the Nevada Supreme Court and the Nevada Attorney General were disqualified from participating in the case, these individuals eventually nullified significant *Whitehead* judgments. This was accomplished by means of an original writ petition filed by the Attorney General against the members of the Nevada Supreme Court who decided *Whitehead*, including Petitioners Chief Justice Thomas L. Steffen and Associate Justice Charles E. Springer. The Attorney General's petition, which sought to vacate a substantial portion of the rulings and relief entered in *Whitehead*, was granted by the two disqualified justices (joined by the lone dissenting member of the *Whitehead* panel). At issue, therefore, is whether the United States Constitution tolerates the disregard by a state supreme court or any of its justices of the basic due process command that judges, once recused, are thereafter powerless to affect the outcome of the same case in which they are disqualified. *Aetna Life Ins. Co., supra.*

This Petition seeks an order (1) vacating the July 12, 1996 Mandamus Order issued by the two disqualified members of the Nevada Supreme Court and (2) directing the two disqualified justices of that court, Associate Justice C. Clifton Young and Associate Justice Robert Rose, to refrain from taking any further action that purports to modify the relief granted by the Nevada Supreme Court in *Whitehead*, including interfering with or blocking the appointment of any replacement judges necessary to finally dispose of the matter. Sup. Ct. R. 20(3). Because Justices Young and Rose have ignored all efforts by the Nevada Supreme Court to prevent their unconstitutional interference with a case in which they are recused and therefore disqualified to act, the relief sought "is not available in any other court." *Id.*

1. In 1993, Judge Jerry Carr Whitehead filed a petition for mandamus with the Nevada Supreme Court. He alleged that the Nevada Commission on Judicial Discipline, which had been investigating him, had exceeded its jurisdiction and failed to abide by its own rules. Among his claims were allegations that the Commission had failed to adhere to confidentiality procedures imposed by the Nevada Constitution. App. G 136a. Nev. Const., art. 6, § 21(5) ("[t]he supreme court shall make appropriate rules for . . . [t]he confidentiality of all proceedings before the commission . . ."); Rule 5(1), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline ("[a]ll proceedings must be kept confidential until there has been a determination of probable cause and a filing of formal statement of charges"). Judge Whitehead asserted that, although Nevada law required pre-probable cause proceedings to be confidential, "the integrity of the whole judicial discipline process [had been] endangered by what appear to be almost routine 'leaks' of judicial disciplinary proceedings." App. C 25a. Judge Whitehead's complaint was solidly grounded: the American Bar Association ("ABA") recommends that judicial disciplinary proceedings be conducted in con-

fidence prior to a finding of probable cause and this recommendation is generally followed throughout the Nation.[1]

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[1] The ABA's Model Rules for Judicial Disciplinary Enforcement provide that, prior to the "filing and service of formal charges," "all proceedings" and "all information" relating to a judicial disciplinary matter "shall be confidential." Model Rule 11(A)(1), (B)(1), Model Rules for Judicial Disciplinary Enforcement. A "formal charge," in turn, is filed only after a "full investigation" demonstrates "reasonable cause to believe the judge committed misconduct." Model Rule 17(D)(1)(c), 17(D)(2)(c), Model Rules for Disciplinary Enforcement *Accord* ABA Standards Relating to Judicial Discipline and Disability Retirement § 4.6 (1978) ("[a]ll proceedings should be confidential until there has been a determination of probable cause and formal charges have been filed").

The ABA recommendation has been implemented in all fifty states and the District of Columbia. Twenty-two states mandate pre-probable cause confidentiality of judicial disciplinary proceedings. Nineteen states "maintain confidentiality until formal proceedings have resulted in a finding of misconduct and a recommendation for discipline is filed with the highest state court, while the remaining ten commissions [including the District of Columbia] maintain confidentiality until the state Supreme Court actually orders discipline." Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 13.15 (1995). *See e.g.*, Ark. Judicial Disc. and Disability Comm. Rules, Rule 7 (1996) ("Investigatory records, files, and reports of the Commission shall be confidential, and no disclosure of information, written, recorded, or oral, received or developed by the Commission in the course of an investigation relating to alleged misconduct or disability of a judge, shall be made . . ."); Colo. Rules of Jud. Disc., Rule 6 (1996) ("All papers and pleadings filed with and proceedings before the commission, . . . shall be confidential until the commission files a recommendation with the Supreme Court for the removal, retirement, suspension, censure, reprimand or discipline of a judge . . ."); Conn. Gen. Stat. § 51-511(a) (1993) (providing for confidentiality of investigations to evaluate "whether or not there is probable cause" that improper conduct has occurred); *In the matter of Rowe*, 566 A.2d 1001 (Del. Ct. Judiciary 1989) (*quoting* Del. Constitution., art. IV, § 37) ("All hearings and other proceedings of the Court on the Judiciary shall be private, and all records except a final order of removal or retirement shall be confidential . . . ."); Fla. Constitution. of 1968, art. V, § 12(d) (1994) ("Until formal charges against a justice or judge are filed by the commission with the clerk of the Supreme

Two members of the Nevada Supreme Court, Justices Rose and Young, as well as the Nevada Attorney General,

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Court of Florida all *proceedings* by or before the commission shall be confidential . . ."); Ga. Rules of Jud. Qualifications Comm., Rule 20 (1996) ("The proceedings of the Commission, including, but not limited to, complaints filed with the Commission, conferences of the Commission with respect to matters pending before it, minutes of actions and decisions of the Commission, correspondence and other communications, and all other papers and documents shall be kept confidential"); Haw. Sup. Ct. Rules, Rule 8 (1996) ("All proceedings involving allegations of misconduct . . . of a judge shall be kept confidential until and unless the Supreme Court enters an order for the imposition of public discipline or the judge requests that the matter be public"); Idaho Jud. Council Rules, Rule 24 (1996) ("All papers filed with and proceedings before the Council . . . shall be confidential until a record is filed by the Council in the Supreme Court"); Ill. Const. art. VI, § 15(c) ("All proceedings of the [judicial investigatory] Board shall be confidential except the filing of a complaint with the Courts Commission"); Iowa Code Ann. tit. XV ch. 602 R. 5 (West 1996) ("[A]ll records, papers, proceedings, meetings, and hearings of the commission shall be confidential" prior to a decision to retire, discipline, or remove a judge); La. Judiicary Comm. Rule 10, La. Rev. Ann. § 8 (West 1996) ("Every effort shall be made by members of the Commission to keep confidential the fact that a complaint has been made or that an investigation is taking place"); Md. Const. art. 4 § 4B(a) ("All proceedings, testimony, and evidence before the Commission shall be confidential"); Mass. Gen. Laws Ann. 211C § 5 (West 1996) (explaining that the Commission on Judicial Conduct must, upon receipt of a complaint, "conduct a prompt, discreet and confidential inquiry"); Mich. Constitution of 1963, art. VI, § 30 (1996) ("The Supreme Court shall make rules . . . providing for confidentiality and privilege of proceedings"); Minn. Bd. Jud. Stds. Rule 6(b) (1996) ("Upon receipt of a complaint as to conduct that might constitute grounds for discipline, the [board] shall conduct a prompt, discreet, and confidential evaluation"); Miss. Const. § 177A ("all proceedings before the commission shall be confidential, except upon unanimous vote of the commission. After recommendation of removal or public reprimand of any justice or judge is filed with the supreme court, the charges and recommendations of the commission shall be made public"); Mo. Sup. Ct. Rules, Rule 12.21 (1995) (requiring that proceedings before the Commission on Retirement, Removal and Discipline be confidential until a recommendation for discipline is filed with the supreme court); Mont.

Frankie Sue Del Papa, had conflicts of interest and accordingly were disqualified from participating in the case.

Constitution. art. VII, § 11 ("The proceedings of the commission are confidential except as provided by statute"); Neb. Const. art. V § 30(5) ("All papers filed with and proceedings before the commission or masters appointed by the Supreme Court pursuant to this section prior to a reprimand or formal open hearing shall be confidential"); N.J. Rules of Court, Rule 2:15-20 (1996) ("The record before the Committee shall be confidential and shall not be available to any person except in the proper discharge of official duties"); N.M. Constitution. art. VI, § 32 ("All papers filed with the commission . . . and proceedings before the commission . . . are confidential"); N.Y. Jud. Law § 45 (McKinney 1996) ("[A]ll complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential . . . ."); N.C. Gen. Stat. § 7A-377(a) (1995) ("[A]ll papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential . . . ."); *Judicial Qualifications Comm'n v. Schirado*, 364 N.W.2d 50, n.1 (N.D. 1985) (*quoting* N.D. Constitution. art. VI, § 12) ("The Supreme Court shall make rules . . . providing for confidentiality of proceedings"); Pa. Const. art. V, § 18(a)(8) ("All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality"); R.I. Sup. Ct. R. art. VI, Rule 4.3 (1995) ("All records and information obtained and maintained by the Committee concerning judicial performance shall be confidential and shall not be disclosed except in accordance with this Rule"); S.C. App. Ct. Rules, Rule 502 (1996) ("Prior to the issuance of an Order by the Supreme Court directing the suspension, [or] discipline, . . . no member of the Commission or its staff, members of the Court, witnesses, or any other person shall disclose the existence or contents of the investigation or proceedings nor any testimony taken nor the papers filed therein unless otherwise directed by the Court"); Tex. Const. of 1876, art. V, § 1a(10) (1995) ("All papers filed with and proceedings before the Commission . . . shall be confidential"); Va. Code Ann. § 2.1-37.13 (Michie 1996) (same); Vt. Rules for Disc. Control of Judges, Rule 6 (1995) ("All papers, files transcripts and communications in proceedings before the Board before filing of a formal charge shall be confidential"); Wash. Comm. on Jud. Conduct Rules, Rule 292-08-050 (1995) ("[T]he fact that a complaint has been made, or a statement has been given to the commission and all papers and matters submitted to the commission together with the investigation and initial proceedings conducted pursuant

App. E 92a; App. G 148a.[2] Two judges were thereafter appointed to fill the vacancies on the *Whitehead* panel. App. G 134a.

2. On July 26, 1994, the Nevada Supreme Court issued an opinion that ordered the Commission to comply with the confidentiality requirements established under the Nevada Constitution in the course of future investigations. App. C 26a. Among other things, the Nevada Supreme Court concluded that, to avoid the "[p]remature exposure of meritless complaints against judges" that "would make it appear that our judges were guilty of rampant misconduct and would threaten the independent function of the judiciary," the "people of this State . . .

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to these rules, shall be confidential"); Wis. Stat. Ann. § 757.93 (West 1996) ("All proceedings . . . relating to misconduct . . . prior to the filing of a petiton or formal complaint by the commission are confidential . . . ."); Wyo. Jud. Supervisory Comm. Rules, Rule 7 (1995) ("All papers filed with and proceedings before the commission shall be confidential").

[2] Justice Rose was disqualified from sitting on the *Whitehead* petition because, at the time the petition was before the Nevada Supreme Court, he had been "secretly recorded by the police as telling the district attorney that he would 'love' to see the criminal charges pending against two friends, one a business associate, 'go away.'" App. G 162a-63a n.12. Justice Rose recused himself after Judge Whitehead filed a motion to disqualify the justice on the ground that the secret meeting with the district attorney "at least arguably" placed Justice Rose "in a position of jeopardy with . . . the Discipline Commission." *Id.* Justice Young was disqualified because he served on the Judicial Discipline Commission during the very period of time in which Judge Whitehead alleged that the Commission had violated the Nevada Constitution and the Commission's own rules. *Id.*

The Attorney General, for her part, was disqualified because one of the contentions in the *Whitehead* matter was that the Attorney General had improperly served as a prosecutor before the Judicial Discipline Commission. App. C 20a, 28a. *Accord,* ABA Standards Relating to Judicial Discipline and Disability Retirement, Standard 2.8 (use of attorney general staff to prosecute or discipline judges "is not recommended" because such conduct may "interfere with the independence of the judiciary").

mandated the confidentiality of judicial discipline proceedings in our fundamental law, the Nevada Constitution." App. C 26a-27a. Accordingly, the court concluded that, prior to a determination of probable cause, judicial disciplinary proceedings must not be publicly disclosed. In reaching this conclusion, the supreme court expressly rejected the contention that "this court lacked the authority to enforce" the confidentiality requirements of the Nevada Constitution and rebuffed as well the argument "that the First Amendment prevents this court from requiring the Commission to enforce its own confidentiality rules." App. C 27a n.15. These rulings brought Nevada law in line with ABA recommendations and judicial disciplinary procedures adopted by the majority of states. Note 1, above.

As part of the relief granted, the Nevada Supreme Court concluded that a special master should be appointed to investigate who was responsible for the contemptuous breaches of confidentiality. App. C 28a. The court reasoned that:

> [i]t is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters . . . . We do, however, conclude that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

App. C 27a-28a. One of the original members of the court (Justice Shearing) dissented from the appointment of the special master. App. C 54a. The special master (with one member of the Nevada Supreme Court dissenting) was appointed September 1, 1995. App. D 85a.

3. In a deposition taken September 2, 1995, the special master discovered that the Attorney General's office and at least two members of the Nevada Supreme Court, among others, were suspected of divulging confidential information regarding the complaint against Judge Whitehead. App. H 212a, 237a, 238a.[3]

4. On September 15, 1995, the two disqualified members of the court, Justices Rose and Young, convened a special administrative panel and, together with Justice Shearing (who dissented from the appointment of the special master), issued an "administrative order" vacating the appointment of the special master. App. B 7a. The disqualified justices and the *Whitehead* dissenter asserted that "the appointment of a special master/prosecutor and concomitant expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." App. B 8a. The disqualified justices therefore "declare[d] void" the order appointing the special master and "prohibit[ed] the payment of any cost or expenditure associated with the appointment of said special master/prosecutor." *Id.*

5. On December 15, 1996, the Nevada Supreme Court issued a *per curiam* opinion vacating the "administrative order." App. E 95a. The court concluded that, because Justices Rose and Young had recused themselves from *Whitehead*, they had no authority to declare (among other things) that the appointment of the special master served "no legitimate purpose." App. B 8a. According to the

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[3] The Interim Report filed by the special master reported:

> 1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the *Whitehead* matter before the Judicial Discipline Commission.
>
> 2. My investigation to date reveals that this disclosure may involve members of a law firm, at least two members of the Supreme Court and the attorney general's office. . . .

App. E 106a.

Nevada Supreme Court, there was "no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case." App. E 95a. As a result, the Nevada Supreme Court concluded that "[t]he order signed by Justices Young, Shearing and Rose, filed on September 15, 1995, which declares certain judgments and orders of this court to be 'void,' is hereby adjudged to be a nullity and of no legal force or effect." *Id.*

6. In response to the above action by the Nevada Supreme Court, on December 21, 1995, the Attorney General (who, like Justices Rose and Young, had been disqualified from participating in *Whitehead*), filed an original petition for mandamus in the Nevada Supreme Court. The Attorney General's petition, filed under the caption *Del Papa v. Steffen* (hereafter *Del Papa* petition), named as Respondents the special master and every member of the *Whitehead* panel except Justice Shearing, who had dissented from the appointment of the special master. App. F 110a. In her petition, the Attorney General asked the court to vacate the confidentiality rulings issued by the Nevada Supreme Court in *Whitehead* and set aside the appointment of the special master. *Id.*

7. Between the appointment of the special master and the filing of the *Del Papa* petition, two members of the *Whitehead* panel became unable to serve (one retired, the other was required to attend to a close family member who was ill). App. G 135a, 172a. On December 20, 1995, Chief Justice Steffen submitted a request to the governor asking him to appoint two replacement judges to the *Whitehead* panel. App. G 139a. Before the governor appointed replacement judges, Justices Rose and Young (who had been disqualified in *Whitehead*) and Justice Shearing (who had dissented), issued an order on December 28, 1995, requiring a majority of the elected members of the supreme court to approve any temporary appointments to the court. App. G 174a. Thereafter, these

three justices refused to permit organization of a full bench for disposition of remaining matters in the *White head* case.

8. After effectively preventing replacements to the *Whitehead* panel, the disqualified and dissenting justices issued an opinion reversing a substantial portion of the rulings and relief entered in *Whitehead*. They did so by issuing a *per curiam* opinion on April 25, 1996, that purported to dispose of the Attorney General's *Del Papa* petition. App. F 110a. The disqualified justices, in reliance upon the jurisdictional and First Amendment arguments rejected by the Nevada Supreme Court in *Whitehead* (App. C 27a n.15), concluded that "[t]he State Constitution and the [Administrative Rules for the Nevada Commission on Judicial Discipline] provide no authority for confidential proceedings before the supreme court itself, and the *Whitehead* panel erred in concluding that it had such authority." App. F 120a. Accordingly, the disqualified and dissenting justices vacated the confidentiality rulings in *Whitehead* and ordered the Nevada Supreme Court to "cease and desist from any further action in the [*Whitehead*] investigation." App. F 132a.

9. In response to this opinion by the two disqualified justices and the *Whitehead* dissenter, and unable to reconstitute a full bench or quorum because of the new appointment rules imposed by the same justices, Chief Justice Steffen and Justice Springer—the only remaining members of the *Whitehead* panel—reluctantly issued a two-justice opinion on July 5, 1996. App. G 133a-86a. Noting that the disqualified and dissenting justices had apparently "achieved 'checkmate' " by reversing *Whitehead* rulings while at the same time preventing replacements to the *Whitehead* panel, Chief Justice Steffen and Justice Springer stated they had considered simply permitting "the three justices to bring this unfortunate matter to a dishonorable close in the hope that time might heal the gangrenous wounds to Nevada's judicial system." App. G

140a. "[H]onor and respect for the rule of law and judicial ethics," however, did not allow this result (*id.*):

> whether judges are entitled to confidentiality until there has been a finding of probable cause and whether serious contempts of this court should be followed up or ignored are, of course, issues which have already been decided by this court and are the law of the case. Such are not, obviously, matters which are subject to interference by the *disqualified* judges, Young and Rose. The issue presented is whether Justices Young and Rose, who were disqualified from acting in this case, have the power, directly or indirectly, to overrule the judgments of the court in this case. They do not have such power, accordingly, all actions of Justices Young and Rose that affect in any way the judgments of the court in this case are declared to be void . . . .

App. G 137a. The July 5, 1996, opinion expressly declared that this result was demanded by the Due Process Clause. App. G 134a.

10. On July 12, 1996, Justices Rose, Young, and Shearing filed the disputed Mandamus Order. Regardless of the due process obligation to refrain from deciding *Whitehead*, the disqualified justices reaffirmed their April 25, 1996, reversal of that opinion. App. A 5a. The justices concluded that the Nevada Supreme Court's orders in *Whitehead* were "based on the false premise that certain aspects of judicial discipline were confidential and that the Supreme Court could act in secret with regard thereto." App. A 3a. Citing as precedent—not any authoritative opinions by the state's highest court—but only their own April 25, 1996, opinion reversing the Nevada Supreme Court's confidentiality rulings in *Whitehead*, the disqualified and dissenting justices held that "the Nevada Supreme Court has no authority to impose a veil of secrecy over judicial disciplinary proceedings in the manner employed." App. A 3a (citing App. F 118a-20a).

The disqualified and dissenting justices, therefore, vacated the appointment of the special master and further ordered the clerk of the court not to accept any new filings in *Whitehead*. App. A 5a.[4]

REASONS FOR GRANTING THE PETITION

Mandamus and prohibition, as recognized by the Rules of this Court, are extraordinary writs issued as a matter "of discretion sparingly exercised." Sup. Ct. R. 20(1). As a general rule, such writs (issued by a superior to an inferior tribunal) are appropriate to control only the most egregious abuses of judicial power.[5] This case is one of

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[4] The July 12 Mandamus Order asserted that the investigation by the special master lacks "any possible vestige of impartiality" because the master's fees had been paid with the personal funds of Chief Justice Steffen and Justice Springer. App. A 3a. This assertion is seriously misleading: it was the presumptuous orders of the disqualified justices—not any effort to exert influence over the investigation—that necessitated the payment to the special master. After the special master had been appointed and had already completed substantial work, the disqualified justices directed the Administrative Office of the Nevada Supreme Court to withhold payment. App. G 168a. Rather than "allow the further erosion of the honor of this court by denying the special master payment for services *already rendered*, and for which payment had been expressly authorized by lawful order of the court," and to avoid placing the Administrative Office of the Nevada Supreme Court in the untenable position of ignoring either the order of the Nevada Supreme Court or the contrary order of the disqualified justices, the Chief Justice and Justice Springer paid the special master directly. App. G 169a (emphasis in original). The payment totaled $1,450, with Chief Justice Steffen and Justice Springer each paying half "in order to honor this court's obligation pursuant to the order of appointment." *Id.*

[5] *Allied Chem. v. Daiflon Inc.*, 449 U.S. 33, 35 (1980) ("[E]xceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of [mandamus]"); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (petition for mandamus is appropriate where there is a "substantial allegation of usurpation of [judicial] power"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate

those rare occasions where the Court should exercise its discretion to remedy a raw disregard of the fundamental demands of due process.

Initially, it is important to recognize the questions that this Petition *does not* present. Despite the contrary arguments contained in the Mandamus Order entered by the two disqualified justices and the *Whitehead* dissenter, this Petition *does not* present the question whether the confidentiality rulings of the Nevada Supreme Court and the appointment of the special master in *Whitehead* were "extra-jurisdictional in nature." App. A 2a. Similarly, the Petition *does not* involve whether the special master's investigation was "unprecedented." *Id.* Nor does the Petition implicate whether the "appointment of the special master was an exercise of extra-constitutional power that was void upon its inception." *Id.* at 3a. The Petition *does not* involve any inquiry into whether an investigation by the special master is "a judicial witch hunt." *Id.* Finally, the Petition *does not* present the question whether the Nevada Supreme Court (like the majority of state courts in the nation, note 1, above) has the "authority to impose a veil of secrecy over judicial disciplinary proceedings." *Id.* The Nevada Supreme Court has already concluded that it has the jurisdiction and constitutional authority to appoint the master, that an investigation into contemptuous breaches of court procedures is neither unprecedented nor a witch hunt, and that the Nevada Constitution—far from forbidding the relief ordered in

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jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"). Writs of mandamus are also granted in instances where, as here, a party has no other avenue for seeking relief. *See Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976) (mandamus is sometimes available where "the party seeking the issuance of the writ [has] no other adequate means to attain the relief he desires").

Whitehead—compels the "veil of secrecy" (*id.*) derided by the disqualified justices. App. C 26a-27a. These issues, having already been decided by the full court, "are the law of the case." App. G 137a.

What *is* presented by this Petition, therefore, is whether two disqualified justices of the Nevada Supreme Court, after the full court has already rejected their jurisdictional and constitutional positions, may declare that the full court's actions are unauthorized and that the court "erred in concluding that it had such authority." App. F 120a. The answer to that question, moreover, is clear: once judges are recused from considering the merits of a matter, they may not thereafter alter the outcome of that case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-828 (1986). Even assuming (as the disqualified justices contend) that the full Nevada Supreme Court erred in asserting jurisdiction or construing the state constitution, correction of any such errors does not lie with disqualified jurists. As this Court has already affirmed, "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Id.*, 475 U.S. at 827-828. The Court should issue a writ of mandamus or prohibition to remedy the obvious disregard of due process disclosed by this record.

I. THE CHALLENGED ORDER MODIFIES THE RELIEF GRANTED IN *WHITEHEAD*

Undoubtedly aware of the unassailable due process demand that, once recused, judges may not thereafter affect the outcome of a case (Section II, below), the Mandamus Order states that "the undersigned majority have in no way attempted to amend, restrict or change" the relief granted in *Whitehead*. App. A 2a. This submission, however, is refuted by the very face of the Mandamus Order.

Among the questions before the Nevada Supreme Court in *Whitehead* was whether the Nevada Constitution man-

dated that judicial disciplinary hearings, prior to a finding of probable cause, be conducted in confidence and, if so, whether the extraordinary pre-probable cause disclosures involving Judge Whitehead should be investigated and remedied. A full and properly constituted panel of the Nevada Supreme Court, with Justice Shearing dissenting, concluded not only that the Nevada Constitution mandated confidentiality but that the contemptuous breaches of that obligation in *Whitehead* demanded judicial investigation and cure.

As the court explained (App. C 25a-26a):

> The argument of some is, of course, that judges are no different from any other public official and that if any allegations of misconduct are made by anyone, such charges should immediately be open to the public. The counterargument (and the one adopted by the framers of the Nevada Constitution) is that the judiciary depends to a large degree for its effectiveness on the trust and confidence that the people place in that institution's ability to render, day-to-day, fair and impartial decisions. By its very nature, the judiciary deals with disputes that often leave litigants or counsel with negative or agitated feelings. As a result, many complaints may be generated and sent to the Commission about judges that are entirely without merit. If all of these unfounded complaints were available to the public and the media, without any inquiry into their substance, public esteem for the judiciary as a whole would suffer, thus making it more difficult for the one branch of government that should be a safe haven for the impartial and fair resolution of disputes, to inspire public confidence in the integrity of judicial proceedings.

Accord authority cited at note 1, above.

The court, therefore, concluded that (App. A 26a-27a):

> [w]hichever side of this argument one might want to espouse, the fact remains that, at present, all com-

> plaints against judges must, as commanded by the Nevada Constitution, and by the rules of this court enacted in accordance with the direct command of the Constitution, remain confidential until there has been a finding of probable cause and a formal statement of charges has been filed as a public document. Despite the voices of those who [minimize] the seriousness of breaches of confidentiality, we are unable to arrogate to ourselves a superior wisdom or authority than the people of this State who mandated the confidentiality of judicial discipline proceedings in our fundamental law, the Nevada Constitution.

In reaching the above conclusions, the full court expressly rejected the argument that "this court lacked the authority to enforce these constitutional provisions, and that the First Amendment prevents this court from requiring the Commission to enforce its own rules." App. A 27a n.15. The full court, furthermore, concluded that, because of the serious breaches of confidentiality involved in *Whitehead*, "[i]t is most apparent that someone must get to the bottom of these flagrant constitutional infractions." App. A 27a. And, because it was "clear that we have the authority to appoint a fact-finding master to delve into the source of the violations," the court concluded that a master would thereafter be appointed to investigate the "breaches of confidentiality that occurred in these proceedings and the extent to which they may have impacted Petitioner's [*i.e.*, Judge Whitehead's] due process rights." *Id.* at 27a-28a.

In light of the foregoing, it is simply disingenuous for the disqualified justices to assert in their Mandamus Order that they "have in no way attempted to amend, restrict or change" the relief granted by the full court in *Whitehead*. App. A 2a. In *Whitehead*, the Nevada Supreme Court concluded that—in line with ABA recommendations and judicial disciplinary procedures followed throughout the Nation (note 1, above)—the Nevada Constitution mandated pre-probable cause confidentiality. App. C 26a-

27a. The disqualified justices, by contrast, and citing only themselves, ruled that "the Nevada Supreme Court has no authority to impose a veil of secrecy over judicial disciplinary proceedings." App. A 3a. The Nevada Supreme Court concluded that it was "most apparent" that the breaches of confidentiality in *Whitehead* should be judicially investigated. App. C 27a. The disqualified justices, by contrast, and invoking only the jurisdictional arguments rejected by the full court (*id.* at 27a n.15), concluded that any investigation was "extra-jurisdictional." App. A 2a. The Nevada Supreme Court, finally, concluded that "we have the authority to appoint a fact-finding master to delve into the source of the violations." App. C 27a. The disqualified justices, by contrast, and again invoking already-rejected First Amendment arguments (*id.* at 27a n.15), ruled that "appointment of the special master was an exercise of extra-constitutional power that was void upon its inception." App. A 3a.

In these circumstances, and despite their protests, it is quite clear that the disqualified justices have entered an Order that "amend[s], restrict[s] or change[s]" the rulings and relief entered in *Whitehead*. App. A 2a. The question remains whether the Due Process Clause permits such a result. The answer is "no."

II. DISQUALIFIED JUDGES MAY NOT AFFECT THE OUTCOME OF THE VERY CASE IN WHICH THEY ARE DISQUALIFIED TO ACT

Perhaps the most basic requirement of due process is that a litigant must receive "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). "Every procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear, and true" denies constitutional due process. *Tumey*, 273 U.S. at 532. As a result, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." *Gay v. United States*, 411 U.S. 974, 975

(1973) (quoting Canon 3(1)(B) of the Code of Judicial Conduct).[6] Justice Rose and Justice Young appropriately recused themselves from consideration of the *Whitehead* petition. Note 2, above. The same constitutional command that required their recusal now demands that they not be permitted effectively to amend the outcome in *Whitehead*.

This Court declared, ten years ago, that it was "aware of no case" that "permit[ted] a court's decision to stand when a disqualified judge casts the deciding vote." *Aetna Life Ins. Co., supra*, 475 U.S. at 827-828. There have been no such cases in the intervening decade. All federal courts that have addressed the issue have held that disqualified judges may *not* participate in any case in which they have recused themselves.[7] All state courts addressing

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[6] Even the appearance of judicial bias should trigger recusal. *In re Murchison*, 349 U.S. at 136. In fact, due process can even require recusal of judges who have no actual bias and "who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 825 (1986). *Accord Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1371 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1404 (1995) ("judges sometimes must recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias"). *See also* American Bar Association, Canon 3(E)(1), *Model Code of Judicial Conduct* (1990).

[7] *El Fenix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136, 142 (1st Cir. 1994) (once a judge enters a recusal order, that order should not even be reconsidered by the judge); *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992), *cert. denied*, 507 U.S. 944 (1993) ("Mandamus is thus the proper remedy to vacate the orders of a judge who acted when he should have recused"); *In Re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992) (mandamus is appropriate "when a district judge continues to sit despite previously having expressed the intent to disqualify himself or herself"); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge has disqualified himself, he or she may enter no further orders in the case"); *New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1986) ("[T]he position that provides the greatest measure of safety for the judicial system as a whole is one that vacates all decisions taken after the filing of

the issue have agreed.[8] Once disqualified from a particu-

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a justified motion to disqualify a judge . . . ."); *United States v. Widgery*, 778 F.2d 325, 328 (7th Cir. 1985) (holding that a court will void all acts made after a judge should have disqualified himself); *Arnold v. Eastern Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) ("Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred."); *McCuin v. Texas Power & Light*, 714 F.2d 1255, 1261 (5th Cir. 1983) ("To permit a disqualified chief judge to select the judge who will handle the case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case"); *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-25 (9th Cir. 1982) (stating that a disqualified judge is only authorized to perform ministerial duties such as assigning the case to another judge); *Ellentuck v. Klein*, 570 F.2d 414 (2d Cir. 1978) ("[I]t is clear that under New York law, if a judge is disqualified, that disqualification strips the court of subject matter jurisdiction"); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956) (after disqualification, judges may perform only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication"); *Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 716 (M.D. Pa. 1996) (after disqualification, judges may perform only the simple duties associated with transferring the case); *Application of Scott*, 379 F. Supp. 622, 624 (S.D. Tex. 1974) (following recusal, judge may enter only ministerial orders such as transferring case to another jurist); *see also Laird v. Tatum*, 409 U.S. 824 (1972) ("Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified *which is equally as strong as the duty to not sit where disqualified*") (emphasis added).

[8] *Johnson v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988) (Arkansas Supreme Court sets aside its own decision after one justice recused from the case); *Gubler v. Comm'n on Judicial Performance*, 688 P.2d 551, 567-68 (Cal. 1984) (stating that once disqualified, a judge may not even offer advice to other judicial officers on how to dispose of the case); *Beckord v. District Court*, 698 P.2d 1323, 1330 (Colo. 1985) (*en banc*) (holding that once a judge has disqualified himself he is without jurisdiction to rule in any subsequent matters); *Johnson v. District Court*, 674 P.2d 952, 957 (Colo. 1984) ("We hold that the respondent judge abused his discretion by refusing to disqualify himself. The order denying the motion for a change of venue is vacated because the respondent judge had no

authority to rule on the matter"); *Bolt v. Smith*, 594 So. 2d 864, 864 (Fla. App. 1992) ("[F]lorida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect"); *Margulies v. Margulies*, 528 So. 2d 957, 960 (Fla. App. 1988) ("[O]nce a trial judge disqualifies himself, he may not 'requalify' himself on removal of the reason for disqualification"); *Rogers v. State*, 341 So. 2d 196, 196 (Fla. App. 1976) ("Once the trial judge recused himself, further orders of his were void and of no effect"); *Butler v. Biven Software*, 473 S.E.2d 168, 170 (Ga. Ct. App. 1996) ("By the nature of [the judge's] recusal, any actions following his recusal or after he should have recused himself are naturally void"); *State v. Evans*, 371 S.E.2d 432, 433 (Ga. Ct. App. 1988) ("A disqualified judge can take no judicial action in the case and any attempt at such action is a mere nullity"); *People v. Langford*, 616 N.E.2d 628, 632 (Ill. App. Ct. 1993), *appeal denied*, 624 N.E.2d 812 (1993) ("If a motion for automatic substitution is improperly denied, all action by the trial court subsequent to the improper denial is void"); *Henderson v. State*, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995) ("[The judge] had previously recused himself from the case and thus was not qualified to reassume jurisdiction"); *Thacker v. State*, 563 N.E.2d 1307 (Ind. Ct. App. 1990) (holding that a judge had no authority after he disqualified himself); *Vacura v. Harr's Equip.*, N.W.2d 387, 393 (Minn. 1985) ("[A]fter a judge has removed himself from a case, he may not issue an order which relates to the merits"); *Ferguson v. Pony Express Courier*, 889 S.W.2d 128, 130 (Mo. Ct. App. 1995) ("[A] judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case"); *Johnson v. Mehan*, 731 S.W.2d 887, 888 (Mo. Ct. App. 1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has no further authority in the case and any orders made after the disqualification are void"); *Byrd v. Brown*, 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981) (holding that, after judge's disqualification, all orders made thereafter are void); *Blaisdell v. Rochester*, 609 A.2d 388, 391 (N.H. 1992) (voiding all subsequent rulings that were based on findings by a judge who should have been disqualified); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 199 (N.M. 1984) ("Since the district court was properly disqualified, it had power only to perform mere formal acts subsequent to the disqualification"); *In the matter of Risovi*, 429 N.W.2d 404 (N.D. 1988) (holding that the orders signed by the judge after he was disqualified are void); *Longhini v. Bishop*, 901 P.2d 962, 965 (Or. Ct. App. 1995) ("As a general rule, a judge who has

lar case, judges are restricted to the "ministerial duties" of transferring the case to a different judge.[9]

The Mandamus Order entered by the disqualified justices is hardly ministerial. Rather, by holding that the Nevada Supreme Court "has no authority to impose a veil of secrecy over judicial disciplinary proceedings" (App. A 3a) and by decreeing that the appointment of the special master constitutes an "unconstitutional investigation[]" (*id.*), the disqualified justices have "cast[] the deciding vote[s]" (*Lavoie*, 475 U.S. at 827-828) on what the disqualified justices themselves describe as crucial "jurisdictional" and "constitutional" issues. App. A 2a-3a. These actions undeniably violate the clear limits set

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been disqualified from a particular case is without authority to act further in any judicial capacity in that case"); *State v. Nossaman*, 666 P.2d 1351, 1355 (Or. Ct. App. 1983) ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statute is void"); *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. Ct. App. 1996) ("If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void and subject to collateral attack"); *McElwee v. McElwee*, 911 S.W.2d 182, 186 (Tex. Ct. App. 1995) ("If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and therefore, any judgment he renders is void and a nullity"); *Chilicote Land Co. v. Houston Citizens Bank & Trust*, 525 S.W.2d 941, 943 (Tex. Ct. App. 1975) (ruling that, once disqualified, the judge was "incapacitated from taking action in the cause which required the exercise of judicial discretion").

[9] *Stringer*, 233 F.2d at 948; *El Fenix*, 36 F.2d at 141 ("As a general rule, a trial judge who has recused himself should take no other action in the case other than the necessary ministerial acts to have the case transferred to another judge"); *In re Aetna Casualty and Sur. Co.*, 919 F.2d 1136, 1145 (6th Cir. 1990) ("[E]ven a judge who has recused himself ought to be permitted to perform the duties necessary to transfer the case to another judge."); *see also* 13A Charles A. Wright, et al., *Federal Practice and Procedure* § 3550 (1984) ("If the judge concludes that he is disqualified he should take no further action in the case except the necessary ministerial acts to have the case transferred to another judge").

by the Due Process Clause. *Lavoie*, 475 U.S. at 827-828. Even if the substantive merit of the confidentiality rulings of the Nevada Supreme Court in *Whitehead* were arguable (App. A 4a) (disqualified justices assert that the *Whitehead* rulings are "folly") (*but cf.* authority collected in note 1), that so-called "folly" may be resolved by only one means: not by the disqualified justices, but by the Nevada Supreme Court.

III. THIS EXTRAORDINARY CASE DEMANDS RELIEF

The Petitioners, the sitting Chief Justice and an Associate Justice of the Nevada Supreme Court, candidly acknowledge the extraordinary nature of this case. "As far as we have been able to ascertain, the action of the [disqualified] justices is without precedent in the annals of American jurisprudence." App. G 149a. The Honorable Justices of this Court, moreover, may well be hesitant to enter into a dispute that (as even the disqualified justices acknowledge) has "resulted in a serious loss of prestige and respect for the [Nevada] judicial system and invited strong criticism from observers both in and out of the state." App. A 4a. However, the novelty and notoriety of this case counsel—not its disregard—but its proper (and constitutionally mandated) disposition. This case involves " 'the right of the public to a properly constituted . . . court.' " *Chandler v. Judicial Council*, 398 U.S. 74, 117 (1970) (Harlan, J., concurring) (quoting *United States v. Malmin*, 272 F. 785, 792 (3d Cir. 1921)). Hence, it is " 'essential' " that this Court issue the requested writ so that " 'orderly proceedings' " in Nevada will " 'be restored.' " *Id.*

In *United States v. Malmin*, 272 F. 785 (3d Cir. 1921), the Governor of the Virgin Islands had ousted a properly appointed district court judge, replacing him with a judicial officer of the Governor's own choosing. The court of appeals issued a writ of mandamus directing the properly appointed federal district judge to resume his post. The court reasoned that mandamus was the appro-

priate remedy because the case involved "the right of the public to a properly constituted trial court" and, without issuance of the writ, "orderly proceedings in the District Court of the Virgin Islands" could not "be restored." 272 F. at 792. Identical reasoning mandates an identical result in this case.

Mandamus lies "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). This extraordinary relief is appropriate when a lower court has transgressed constitutional limits.[10] Here, the disqualified justices should be directed to conform their conduct to the unquestionable norm established by the federal Due Process Clause. *In Re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992) (mandamus is appropriate to prevent a district judge from sitting after previously expressing "the intent to disqualify himself or herself"); *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992) ("Mandamus is thus the proper remedy to vacate the Orders of a judge who acted when he should have recused"). That direction should include a command to vacate their July 12, 1996 Mandamus Order, as well as instructions to refrain from interfering in any manner with the appointment of any replacement judges necessary to finally dispose of *Whitehead. McCuin v. Texas Power & Light*, 714 F.2d 1255, 1261 (5th Cir. 1983) (concluding that a recused federal judge may not participate in the selection of his or her replacement).

The disqualified justices have argued that their Mandamus Order will restore public confidence in a beleaguered state judicial system. App. A 4a. The disqualified

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[10] *E.g., Allied Chem. v. Daiflon Inc.*, 449 U.S. 33, 35 (1980) ("[E]xceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of [mandamus]"); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (mandamus is appropriate where there is a "substantial allegation of usurpation of [judicial] power").

justices' disregard of the fundamental limits set by the Due Process Clause, however, can hardly reinvigorate public confidence but will rather (in the disqualified justices' own words) "do further irreparable damage[] to the prestige of the Nevada Supreme Court, both in and out of the state." *Id.* Unless this Court acts, it will be painfully obvious to every citizen residing in (and without) the State of Nevada that, notwithstanding the Fourteenth Amendment's command that state judicial systems operate within the boundaries set by "due process of law" (U.S. Const. amend. XIV), Nevada judges are free to determine the merits of cases they are disqualified to decide. The Nevada judicial system will retain (at best) merely the appearance of constitutionally mandated impartiality because it will be obvious to all involved that—should a recused judge or justice disapprove of a substantive result —that jurist can re-enter a lawsuit to redetermine its outcome. The nationwide system of justice governed by the Due Process Clause cannot tolerate this mockery of the bedrock principle of judicial neutrality.

This Court, as well as every other federal and state court that has addressed the issue, has unambiguously declared that—once disqualified—judges may not thereafter affect the outcome of a case. Notes 7-8, above. Petitioners respectfully request this Court's assistance in enforcing this basic command of the United States Constitution so that the process of restoring public confidence in the impartiality of a badly battered state judicial institution can begin. There is no entity other than this Court that can enforce the unambiguous dictates of the Due Process Clause here. Sup. Ct. R. 20; App. A 5a (Mandamus Order directs Clerk of the Nevada Supreme Court to refuse all further filings in *Whitehead*).

CONCLUSION

The petition for a writ of mandamus or prohibition should be granted. The Court should vacate the July 12, 1996 Mandamus Order of the disqualified justices (App. A 1a) and direct the disqualified justices, Justice C. Clifton Young and Justice Robert Rose, to refrain from taking any further action modifying the relief granted by the Nevada Supreme Court in *Whitehead*, including any actions interfering with the appointment of any necessary replacement judges. Sup. Ct. R. 20(3); *McCuin, supra*, 714 F.2d at 1261.

In the alternative, the Court should issue a writ of certiorari to review the July 12, 1996 Mandamus Order.

Respectfully submitted,

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